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7 8	UNITED STATES DISTRICT COURT				
9	DISTRICT OF NEVADA				
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11	JANIX, INC.,				
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14	4 Vs. JOEL RAES and CONSUELA KONI RAES,	(O R D E R		
15	5 SOLE ICILES and CONSCLEAR ROTALIES,	<u>`</u>	SKDLK		
16)				
17	Before the Court is Plaintiff's <i>Ex Parte</i> Motion to Stay Requirement to File Disocovery Plan (#16), filed on May 20, 2013. BACKGROUND				
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20					
21	On December 6, 2012, the Plaintiff filed a con	On December 6, 2012, the Plaintiff filed a complaint and amended complaint in this			
22	matter alleging embezzlement by its former website n	natter alleging embezzlement by its former website manager. On April 5, 2013, the Defendants			
filed a motion to dismiss. That motion to dismiss was fully briefed on May 2, 2013, and					
24	pending. To date, the parties have not filed a proposed discovery plan and scheduling order a				
25	required by Fed.R.Civ.P. 26. The Rule 26(f) conference was required to be held within 30 days				
26	of April 5, 2013, when the first Defendants filed their Motion to Dismiss, and the stipulated discovery plan was due 14 days thereafter. <i>See</i> Local Rule 26-1(d). Thus, the final date to submit				
27	the proposed discovery plan and scheduling order was May 20, 2013.				
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Instead of filing a discovery plan, however, according to the Plaintiff, the parties have recently agreed to submit to arbitration on this matter. The Plaintiff anticipates that a stipulation to arbitrate will be submitted to the Court within two weeks of May 20, 2013. For this reason, the Plaintiff requests that the Court allow the parties to submit their stipulation concerning arbitration in lieu of a discovery plan. The Plaintiff has filed this request as an *ex parte* motion.¹

DISCUSSION

"When an ex parte motion is filed . . . [t]he judge drops everything except other urgent matters to study the papers. It is assumed that . . . all will be lost unless immediate action is taken." *Mission Power Eng'g Co. v. Cont'l Cas. Co.*, 883 F. Supp. 488, 491-92 (C.D. Cal. 1995). "Lawyers must understand that filing an *ex parte* motion, whether of the pure or hybrid type, is the forensic equivalent of standing in a crowded theater and shouting, 'Fire!' There had better be a fire." *Id.* Accordingly, courts are highly sensitive to unwarranted *ex parte* motions. *Id*.

Rule 7–5 of the Local Rules of Practice states, "[a]ll *ex parte* motions, applications or requests shall contain a statement showing good cause why the matter was submitted to the Court without notice to all parties, [and] applications or requests may be submitted *ex parte* only for compelling reasons, and **not for unopposed or emergency motions**." LR 7-5(b)-(c) (emphasis added). In order to show that ex parte relief is necessary, "[f]irst, the evidence must show that the moving party's cause will be irreparably prejudiced if the underlying motion is heard according to regular noticed motion procedures." *Mission Power Eng'g Co. v. Cont'l Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995).

"A sliding scale is used to measure the threat of prejudice. If the threatened prejudice would not be severe, then it must be apparent that the underlying motion has a high likelihood of success on the merits. If drastic harm is threatened, then it is sufficient to show that there are close issues that justify the court's review before the party suffers the harm." *Id*.

¹The motion contains a certification that it was served via Nevada's CM/ECF "which will send notification of such filing and constitute e-service of same to Defendants' counsel of record in this case." Docket. No. 16, at 3. Since counsel filed this motion *ex parte*, however, this certification is inaccurate. The Plaintiff subsequently filed a separate certification indicating that the motion was served via U.S. Mail. Docket No. 17.

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Here, the Plaintiff failed to show good cause why this motion was submitted to the Court as an *ex parte* motion. See LR 7-5(b). The Plaintiff does not even attempt to argue that it will be irreparably prejudiced if the underlying motion is heard according to regular noticed motion procedures. Rather, the Plaintiff states that the Defendants have agreed to arbitration and that the parties will be filing a stipulation shortly. If both parties wish to stay this case pending their formal stipulation to arbitrate, the correct manner to make this request is a stipulation to stay.² The present motion to stay simply does not establish that the Plaintiff will be irreparably prejudiced if its motion is heard on the regular motion calendar.

Additionally, the Court notes that the parties did not properly meet and confer prior to the filing of this motion. LR 26-7(b) provides that a "[d]iscovery motion will not be considered unless a statement of the movant is attached thereto certifying that, after personal consultation and sincere effort to do so, the parties have not been able to resolve the matter without Court action. LR 26-7. Personal consultation means the movant must "personally engage in two-way communication with the nonresponding party to meaningfully discuss each contested discovery dispute in a genuine effort to avoid judicial intervention." *ShuffleMaster, Inc. V. Progressive Games, Inc.*, 170 F.R.D. 166, 171 (D. Nev. 1996). Meaningful discussion means the parties must present the merits of their respective positions and assess the relative strengths of each. *See Fifty-Six Hope Rd. Music, Ltd. v. Mayah Collections, Inc.*, 2007 WL 1726558, *11 (D. Nev. June 11, 2007). Here, the Plaintiff failed to indicate what efforts, if any, were made to meet and confer prior to filing this *ex parte* motion.

Accordingly, the parties should properly meet and confer on this issue and try to reach an agreement on this matter. However, if no agreement can be reached, the Plaintiff may re-file this motion as a noticed motion and, upon a showing of good cause, may request an expedited briefing schedule.

²Stipulations to stay are subject to the requirements articulated in *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D 597(D. Nev. 2011).

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1	<u>CONCLUSION</u>		
2	Based on the foregoing, and good cause appearing therefore,		
3	IT IS HEREBY ORDERED that Plaintiff's Ex Parte Motion to Stay Requirement to File		
4	Disocovery Plan (#16) is DENIED without prejudice.		
5	DATED this 20th day of May, 2013		
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8	NANCY J. KOPPE		
9	United States Magistrate Judge		
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